No. 893

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

BELL LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court For the Southern District of West Virginia

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JURISDICTIONAL STATEMENT

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
THE QUESTIONS ARE SUBSTANTIAL	8
1. Conflict Between Ninth and Fourth Circuits Concerning the Legal Significance of the Commission's Regulations Concerning the Issuance of Temporary Franchises to Motor Carriers	8
2. Conflict Between Sixth and Fourth Circuits Regarding the Binding Effect of the Commission's General Rules of Practice	9
3. Administrative Due Process Requires Commission to Observe Its Temporary Authority Rules and Regulations	11
4. Interpretation of Temporary Authority Rules Here Critically Important to For-Hire Motor Carrier Industry	15
5. Changed Circumstances Since Grant of Temporary Authority Require Judicial and Agency Re-evaluation	17
CONCLUSION	20
APPENDICES	
APPENDIX A (Memorandum Opinion of Lower Court)	21-40
APPENDICES B-1, B-2 (Orders of Lower Court)	41-43
APPENDICES C-H (Order of Commission)	44-63
APPENDIX I (Statutes)	64-68
CERTIFICATE OF SERVICE	69

CITATIONS

CASES: Page

Acme Cartage Co. v. *United States*, 280 F. Supp. 453 (W.D. Wash., 1968) 8, 15
American Trucking Assn's., Inc. v. *Atchison, T.& S.F.R. Co.*, 387 U.S. 397 (1967) 2
American Trucking Assn's., Inc. v. *United States*, 361 U.S. 1 (1960) 2, 3
Atlantic Coastline R. R. v. *United States*, 173 F. Supp. 871 (E.D. Va., 1958) 10, 12
Black Ball Freight Service v. *United States*, 298 F. Supp. 1006 (W.D. Wash., 1969), prob. juris. noted, No. 382, October Term, 1969, *sub nom. American Farm Lines* v. *Black Ball Freight Service* 8, 15
Burlington Truck Lines v. *U. S.*, 371 U.S. 156 (1962) 19
City of Philadelphia v. *United States*, 197 F. Supp. 832 (E.D. Pa., 1961) 10
Columbia Broadcasting System v. *United States*, 316 U.S. 407 (1942) 14, 15
Eazor Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc., 101 M.C.C. 719 10
Estes Express Lines v. *United States*, 292 F. Supp. 842 (E.D. Va., 1968), aff'd per curiam, 394 U.S. 718 (1969) 8
Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483 ..... 9, 12, 13
Keystone Motor Express, Inc. v. *United States*, 228 F. Supp. 793 (S.D. W.Va., 1964) 10
Malone Freight Lines, Inc. v. *United States*, 204 F. Supp. 745 (N.D. Ala., 1962) 10
Minneapolis and St. L.R.Co. v. *United States*, 361 U.S. 173 (1959) 11
Mississippi Valley Barge Line Co. v. *United States*, 252 F. Supp. 162 (E.D. Mo., 1966), appeal dismissed, 385 U.S. 32 ..... 11, 12, 15
Pacific Molasses Co. v. *F.P.C.*, 356 F. 2d 386 (5th Cir., 1966) 11

Page

Pan-Atlantic S.S. Corp. v. *Atlantic Coastline R. Co.*, 353 U.S. 436 (1957) 16
Railway Express Agency, Incorporated, Extension —Charleroi, Docket No. MC-66562 (Sub-Nos. 1943, 1945, and 1948) 17
Resort Bus Lines, Inc. v. *United States*, 164 F. Supp. 742 (S.D. N.Y., 1967) 10
Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 211 (C.A. D.C., 1959), cert. denied, 376 U.S. 915 11
School District 2 Fractional v. *United States*, 229 F. 2d 681 (6th Cir., 1956) 10
Service v. *Dulles*, 354 U.S. 363 (1957) 15
Superior Trucking Company, Inc. v. *United States*, 1969, C.C.H. Fed. Car. Cas. § 82108 (N.D. Ga., 1969) 8
Transamerican Freight Lines v. *United States*, 258 F. Supp. 910 (D. Del., 1966) 10
United States v. *Drum*, 368 U.S. 370 (1962) 2
United States, ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 11
Upjohn Co. v. *Pennsylvania R.R. Co.*, 381 F. 2d 4 (6th Cir., 1967) 9, 10, 11
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 11
W. J. Digby, Inc., Extension—Seven States, 98 M.C.C. 779 (1964) 17
Yellin v. *United States*, 374 U.S. 109 (1963) 11

STATUTES:

49 C.F.R.:

§ 1100.101(a)(4) 6
§ 1100.101(f) 9
§ 1100.101(g) 9, 67

49 C.F.R. Part 1131:

§ 1131.2(c) 2, 8, 64, 65, 66
§ 1131.6 ..... 9, 66

5 U.S.C. § 557 ..... 3, 7, 8, 11, 67, 68
5 U.S.C. § 558 16

Page

28 U.S.C.:
§ 1253 2
§ 1336 2
§ 2101(b) 2
§ 2321-2325 2
49 U.S.C. § 306 4
49 U.S.C. § 310a(a) 3, 4, 11, 12, 14, 64

MISCELLANEOUS:
I.C.C., Report of Basic Policy Matters under Consideration by the Interstate Commerce Commission, app. D. Table 2 (1969) 16

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of West Virginia, dismissing their complaint to set aside an order of the Interstate Commerce Commission, and submit this

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* Akers Motor Lines, Inc.; Bell Lines, Inc.; Carolina Freight Carriers Corporation; Central Motor Lines, Inc.; Consolidated Freightways of Delaware; Dance Freight Lines, Inc.; Gordon's Transports, Inc.; Great Lakes Express Company; Hennis Freight Lines, Inc.; Johnson Motor Lines, Inc.; Mason & Dixon Lines, Inc.; McLean Trucking Company; Mercury Motor Express, Inc.; Roadway Express, Inc.; Smith's Transfer Corporation; The National Transit Corporation; Tower Lines, Inc.; United Trucking Service, Inc.; Youngblood Truck Lines, Inc.; Watkins Motor Lines, Inc.

Statement to show that the Supreme Court of the United States has jurisdiction over the appeal and that the questions presented are substantial and deserving of plenary consideration.

OPINION BELOW

The opinion of the court below has not been reported as of the time of the filing of this Statement. A copy of the District Court's memorandum opinion, dated September 19, 1969, is set forth at Appendix A hereto. The judgment of the lower court from which this appeal is taken appears at Appendix B. The orders of the Interstate Commerce Commission, in Docket No. MC-10761 (Sub-No. 115 TA), *Transamerican Freight Lines, Inc., Detroit, Mich.*, that were the subject of the judicial review proceeding brought in the court below appear at Appendices C through H.

JURISDICTION

This is an action brought under 28 U.S.C. §§ 1336 and 2321-25 to set aside an order of the Interstate Commerce Commission, dated December 5, 1967 (Appendix C), granting Tarnsamerican 180-day temporary motor carrier authority. A hearing was held before a 3-judge District Court, and on October 22, 1969, that court entered its judgment dismissing appellants' complaint. Notice of Appeal was filed in the District Court on October 30, 1969.

The jurisdiction of this Court to review the final judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining this Court's jurisdiction on appeal from decisions of 3-judge district courts reviewing orders of the Interstate Commerce Commission include *American Trucking Assn's, Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967); *United States v. Drum*, 368 U.S. 370 (1962), and *Amer-*

ican Trucking Assn's, Inc. v. *United States*, 364 U.S. 1 (1960).

STATUTES INVOLVED

The statutes involved are Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a); Temporary Authority Regulations, 49 C.F.R. §§ 1131.2(c) and 1131.6; 49 C.F.R. Transportation Chapter 1—Interstate Commerce Commission Sub Chapter A—General Rules of Practice, § 1100.101(g); and Section 8 of the Administrative Procedure Act, 5 U.S.C. § 557. The statutes are set forth at Appendix I.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may waive or ignore its own regulations governing the issuance of temporary franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act, and act affirmatively on an application failing to comply with such regulations.

2. Whether the Interstate Commerce Commission in considering favorably a "successive petition on the same grounds by the same party" contrary to its own Rules of Practice and in the absence of a statement of the reasons justifying such action, contravened the provisions of Section 8 of the Administrative Procedure Act or otherwise violated principles of administrative or procedural due process.

3. Whether the District Court erred in refusing to require the Interstate Commerce Commission to review its decision of December 5, 1967, to grant temporary authority to Transamerican Freight Lines, in light of changed conditions and circumstances?

STATEMENT OF THE CASE

This controversy began with an application filed on June 12, 1967, by Transamerican under Section 210a(a) of the Interstate Commerce Act for 180-day temporary authority to operate as a motor common carrier, over regular routes, transporting general commodities, with the usual exceptions, over a network of various routes between points authorized to be served by Transamerican in New England, Middle Atlantic, and Central States territories, on the one hand, and, on the other, the industrialized and more heavily populated points and areas in North Carolina, South Carolina, and Georgia. Transamerican submitted letters from 363 shippers and receivers of freight alleging an "immediate and urgent need" for its service. A corresponding application for permanent authority, Docket No. MC-10761 (Sub-No. 184), had been filed on October 5, 1965, pursuant to Section 206 of the Interstate Commerce Act, 49 U.S.C. § 306.

Notice of the filing of the temporary authority application was published in the *Federal Register* and protests to the grant of the application were filed by numerous existing carriers including appellants. The protestants, including appellants, hold permanent certificates of public convenience and necessity which authorize service wholly duplicative or substantially duplicative of the temporary certificate sought by Transamerican.

By order of the Commission's Temporary Authorities Board, dated July 19, 1967 (Appendix D), the application for temporary authority was denied on the ground that Transamerican had failed to established an "immediate and urgent" need for the proposed service as required by Section 210a(a).

On August 10, 1967, Transamerican filed a petition with the Commission seeking reconsideration of the Board's order. Appellants and others opposing the application replied to the petition contending that the evi-

dence failed to establish an "immediate and urgent" need for a grant to Transamerican of the authority sought, and that the Board's denial of the application was in conformity with the evidence and applicable law.

By order dated September 27, 1967 (Appendix E), the Commission's Division 1, acting as an Appellate Division, denied the petition for reconsideration for the reason that no showing had been made which would warrant a conclusion different from that reached by the Board. One Commissioner of the 3-man Appellate Division dissented.

On October 30, 1967, Transamerican filed a "Petition for Receipt of Additional Evidence and for Reconsideration of the Order of Division 1." The additional evidence consisted of letters from shippers or consignees grouped into categories of alleged complaints identical in form and substance to the evidence submitted with the application. Various replies as well as motions to reject or strike Transamerican's petition of October 30, 1967, were filed by appellants on the ground that the order appealed from was administratively final and Transamerican's petition could not be entertained under the Commission's Rules of Practice.

By order dated December 5, 1967 (Appendix C), Division 1, again acting as an Appellate Division, "vacated and set aside" its prior order denying the application and granted Transamerican temporary authority. One Commissioner changed his vote, thereby making the grant of the application possible. On December 14, 1969, appellants and others requested the Commission's Division 1 to stay the effectiveness of its order of December 5 to permit the filing, consideration, and disposition of petitions seeking reconsideration by the entire Commission. These requests were denied.

On December 15, 1967, appellants filed a complaint in the District Court, seeking to enjoin and annul the order of December 5 and asking the court to enter a restrain-

ing order until hearing on a motion for a preliminary injunction. The lower court entered the restraining order on December 15, 1967, pending hearing on the motion for a preliminary injunction, which was scheduled for December 19, 1967. However, by order dated December 15, 1967 (Appendix F), the Commission stayed until December 31, 1967, the effectiveness of its order of December 5. In view of the Commission's action, the hearing on the preliminary injunction was postponed and the restraining order expired by its terms.

Appellants then filed a petition with the Commission seeking (1) reconsideration of the December 5 order granting the temporary authority, and (2) review by the entire Commission, oral argument, and a stay of the taking effect of the temporary authority. Transamerican replied to the petitions claiming, in effect, that the December 5 order was both proper and correct.

On December 29, 1967, the Commission, again Division 1 acting as an Appellate Division, served an order dated the same date (Appendix G), denying appellants' petition for reconsideration and for other relief on the ground that no sufficient reasons had been advanced which would warrant the relief sought. The orders extended the effective date of the December 5 order, as extended by the order of December 15, until January 5, 1968. Appellants next filed a petition with the Commission asking it to find that this proceeding involved an issue of General Transportation Importance. By letter dated January 3, 1968, the Secretary of the Commission refused to accept the petition on the ground that Rule 101(a)(4) of its General Rules of Practice did not permit the relief sought. Under the Commission's Rules of Practice, appellants had exhausted their administrative remedies.

On January 5, 1968, appellants filed a motion with the court seeking a temporary restraining order so as to prevent Transamerican from instituting operations under

the temporary authority, pending hearing on their request for a preliminary and permanent injunction. The lower court continued the restraining order and set the matter down for hearing on January 19, 1968.

The 3-judge District Court issued its Memorandum Opinion on September 19, 1969. As pertinent here, it found (1) that "the 11 rules of the Commission relating to the contents of letter statements supporting applications for temporary authority are not legal absolutes but administrative guidelines," (2) that Section 8 of the A.P.A. does not apply to the Commission's temporary authority orders, and (3) that the Commission acted within its authority in considering the October 30 petition of Transamerican. (pp. 34-36, 38)

Appellants filed motions for stay of entry of judgment pending consideration by the Commission of petitions seeking reconsideration of the grant of temporary authority because of intervening changed circumstances. The basis of the further petitions to the Commission was that Transamerican's application for permanent authority had been heard by a hearing examiner, and he had served a report and recommended order recommending denial of the application. While the motions were pending before the court, the Commission, by order dated October 17, 1969 (Appendix H), denied the petition for reconsideration stating that no showing had been made which would warrant a conclusion different from that reflected by the order of December 5, 1967. Certain appellants filed a motion with the court for a new trial in light of the changed circumstances resulting from the examiner's denial of the permanent application and for an order continuing the court's restraining order pending appeal to the Supreme Court should the motion for new trial be denied. On October 22, 1969, the District Court denied the motion for a new trial and entered judgment for defendants, but stayed the effectiveness of its judgment until November 21, 1969, to enable appel-

lants to appeal to the Supreme Court for a further stay of the judgment of the lower court.

As noted earlier, Notice of Appeal was filed with the District Court on October 30, 1969. On November 21, 1969, Chief Justice Warren E. Burger denied the application for further stay pending consideration by this Court of appellants' appeal.

THE QUESTIONS ARE SUBSTANTIAL

The judgment of the court below is in direct conflict with decisions in other judicial circuits[1] in two respects, and it gives rise to substantial questions of administrative law having far reaching consequences regarding the Commission's issuance of temporary franchises to motor carriers.

1. The lower court's holding that the 11 informational items set forth in 49 C.F.R. 1131.2(c) (Appendix I) required in statements supporting applications for temporary authority *are not legal absolutes but administrative guidelines*, is in direct conflict with the decision of the 3-judge district courts in *Acme Cartage Co.* v. *United States*, 280 F. Supp. 453 (W.D. Wash., 1968) and *Black Ball Freight Service* v. *United States*, 298 F. Supp. 1006 (W.D. Wash., 1969). The *Acme* and *Black Ball* courts held that the Commission is bound by the "mandatory" language of its temporary authority rules and regulations, specifically Section 1131.2(c), and that the Commission's orders granting temporary authority in those cases were infirm because of the motor carrier applicants' failure to comply with such regulations. In both cases the courts enjoined the Commission's grant of temporary authority.

[1] The lower court here cites *Superior Trucking Company, Inc.* v. *United States*, 1969, C.C.H. Fed Car. Cas. ¶ 82108 (N.D. Ga., 1969) and *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va., 1968); aff'd. *per curiam*, 394 U.S. 718 (1969), in support of its action. Appellants believe those cases to be factually distinguishable.

The Commission and American Farm Lines, the unsuccessful applicant for the temporary authority in the *Black Ball* case, appealed the lower court's decision to this Court (*Interstate Commerce Commission* v. *Black Ball Freight Service*, No. 382, October Term, 1969; *American Farm Lines* v. *Black Ball Freight Service*, No. 369, October Term, 1969), and the Court has noted probable jurisdiction. Inasmuch as this case involves an issue common to one of the two questions presented in the *American Farm Lines* case, the noting of probable jurisdiction here would appear to be appropriate.

2. The district court's holding that the Commission acted properly in considering Transamerican's October 30, 1967 "Petition for Receipt of Additional Evidence and for Reconsideration of the Order of Division 1" is in direct conflict with the Court of Appeals decision in *Upjohn Co.* v. *Pennsylvania R.R. Co.*, 381 F. 2d 4 (6th Cir., 1967) and at odds, at least in principle, with other court decisions.

Rule 101(g)[2] of the Commission's Rules of Practice provides, *inter alia*, "When an Appellate Division [as here] has denied a petition seeking reversal * * * of an original determination by a board * * * any further petition by the same party * * * upon substantially the same grounds *will not be entertained*." (Emphasis added.) That the petition of Transamerican, filed on October 30, 1967, was successive cannot be questioned—that it was on substantially the same grounds is tacitly conceded,[3] and the additional evidence submitted with the petition is admittedly cumulative.

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[2] This provision is incorporated by reference in 49 C.F.R. 1131.6. Ex Parte MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 496. See also, Rule 101(f) of the Rules of Practice which precludes consideration of successive petitions by the entire Commission.

[3] Page 6, Transamerican's Petition of October 30, 1969.

In *Upjohn*, the 6th Circuit Court of Appeals held to be erroneous, as a matter of law, Commission action entertaining a successful petition submitted by the same party upon substantially the same grounds as a former petition which had been considered and denied. The court held that procedural rules adopted by a Federal agency are binding on the agency as well as upon parties appearing before the agency. The court quoted with approval an earlier opinion of the same court in *School District 2 Fractional* v. *United States*, 229 F. 2d 681, 686 (1956) wherein it stated:

> "This holding is buttressed by the settled rule that valid administrative regulations bind the administrator himself equally with others [citations omitted], the same as though the provisions of the regulation were prescribed in terms by that statute."

See also: *Keystone Motor Express, Inc.* v. *United States*, 228 F. Supp. 793 (S.D.W.Va., 1964); *Malone Freight Lines, Inc.* v. *United States*, 204 F. Supp. 745 (N.D. Ala., 1962); *City of Philadelphia* v. *United States*, 197 F. Supp. 832 (E.D. Pa., 1961); *Atlantic Coastline R.R.* v. *United States*, 173 F. Supp. 871 (E.D. Va., 1958).

At least one court (*Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910 (D. Del., 1966), has gone so far as to conclude that the Commission, even with an adequate expression of the reasons justifying departure from its rules, cannot do so. It appears however that, at a very minimum, the Commission, or any agency, in departing from its Rules of Practice, must express the reasons underlying such action. (See, *Resort Bus Lines, Inc.* v. *United States*, 164 F. Supp. 742 (S.D. N.Y., 1967); *Eazor Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719)

As the record in this proceeding reflects, the Division's departure from the requirements of the Rules of Practice was forcefully challenged as unlawful. Despite such

challenge, the Division, without any explanation whatsoever, reversed its earlier decision and vacated without reason an administratively final order. In fact, the Commission failed to even acknowledge consideration of the petitions and motions filed by appellants and others in opposition to Transamerican's October 30 pleading.

The failure of the Commission to follow its Rules in the first instance, or to give the reason why it was waiving its Rules, is in direct conflict with the language of Section 8 of the Administrative Procedure Act. That section has been held to apply to I.C.C. action in other areas (*Minneapolis and St. L. R. Co.* v. *United States*, 361 U.S. 173, 193-94 (1959)), and requires the agency to include in its decision "a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . ." This case, dealing as it does with an I.C.C. grant of temporary authority under Section 210a(a), appears to be one of first impression so far as Section 8 of the A.P.A. is concerned. It presents, therefore, a novel, yet significant, question for this Court's consideration.

3. This Court has established and consistently applied the important rule of administrative due process that an executive agency must observe its own rules and regulations. *United States, ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Yellin* v. *United States*, 374 U.S. 109 (1963); *Pacific Molasses Co.* v. *F.P.C.*, 356 F. 2d 386 (5th Cir., 1966); *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 211 (C.A. D.C., 1959), *cert. denied*, 376 U.S. 915. And the lower courts have vigorously enforced this canon against the administrative agencies, including the Interstate Commerce Commission. *Upjohn Co.* v. *Pa. R.R., supra.*; *Mississippi Valley Barge Line Co.* v. *United States*, 252 F. Supp. 162 (E.D. Mo., 1966), appeal dis-

missed, 385 U.S. 32; *Atlantic Coastline R.R.* v. *United States*, *supra*.

Section 210a(a) of the Interstate Commerce Act provides, in part:

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearing or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." [Section 210a(a) was enacted by Congress in June, 1938 (52 Stat. 1238)]

In the years following Congress's grant of authority to the Commission to authorize temporary motor carrier operations, there was much confusion relating to temporary authority applications because of the absence of standards as to what would be acceptable to the Commission as establishing an "immediate and urgent" need for a temporary franchise. As a result, slipshod and even fraudulent practices developed in the processing of temporary authority applications. Cognizant of the many problems resulting from the absence of proper rules and regulations, the Commission, by notice and order entered November 5, 1964, had published in the *Federal Register* of November 18, 1964; proposed rules governing disposition of "temporary authority applications under Section 210a(a) of the Interstate Commerce Act"; and, thereafter, upon receipt of representations from a number of individual carriers and others, adopted the proposed rules on April 7, 1965. They became effective on July 1, 1965. Issued in Ex Parte No. 67, 98 M.C.C. 483, and pub-

lished at 49 C.F.R. 1131, the rules specify with particularity the content of statements filed in support of temporary authority applications. The paragraph immediately preceding the specification of various areas of information to be submitted states, *inter alia*, "each application for temporary authority *must* be accompanied by supporting statements * * *", and: "any such supporting statement must contain at least the following information" (emphasis added):

> "(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).
>
> (2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)
>
> (3) Volume of traffic involved, frequency of movement, and how transported now and in the past.
>
> (4) How soon the service must be provided and the reasons for such time limit.
>
> (5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.
>
> (6) Recital of the consequences if service is not made available.
>
> (7) The circumstances which created an immediate and urgent need for the requested service.
>
> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known. (98 M.C.C. at 490-492; 49 C.F.R. 1131.2(c)."

There is no dispute that the Commission, in disposing of temporary authority applications under Section 210a (a) has the power to establish standards of policy governing disposition of such applications, either through announcements in individual cases or through establishment of standards under its rulemaking powers. Moreover, there is no dispute that under Section 210a(a) the Commission has broad discretionary powers, just as it does in the administration of a number of the other sections of the Inter-state Commerce Act. However, in the area of temporary authorities, the Commission has elected to establish standards through a rule-making proceeding; and since its rules, as adopted, have remained unamended since their effective date of July 1, 1965, the Commission, is, like all others, bound by those regulations and they have the force and effect of law. For in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), this Court stated at p. 422:

"Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be

taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. * * *"

The fact that the regulations prescribed by an administrative agency pertain to a "discretionary matter" does not in any way alter their binding nature. *Service* v. *Dulles*, 354 U.S. 363 (1957). See also: *Mississippi Valley Barge Company* v. *United States*, *supra*.

The statements submitted in support of Transamerican's application for temporary authority did not comply with the mandatory requirements of the Commission's above 11 informational items, the same basis for the *Acme* and *Black Ball* courts' holdings that the grants of temporary authority there were improper. In fact, it was conceded by the Government and acknowledged by the court below, that there was not complete compliance with the Commission's Rules; substantial compliance or partial compliance was deemed sufficient to justify the Commission's grant of authority. (pp. 17-18, 21)

4. The questions presented involve not only interpretation of a Federal statute and Commission Rules and Regulations promulgated to effectuate such statutory authority, but are of major significance and critical importance to the for-hire motor carrier industry generally. The gravity of the conflicts between the circuits on the issues raised here can be noted from the fact that the number of motor carrier applications for temporary

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*The lower court refers to a 42-page chart of the [illegible] ments showing their compliance with the 11 requirements and erroneously states that the chart had been prepared by the Commission; thus, inferentially suggesting that the Commission had found taking consideration to the supporting shipper statements. In fact, the 42-page chart was prepared and submitted by appellants and shows clearly that the supporting letters fall far short of meeting the 11 informational requirements, particularly items 8 and 9.

authority in June was 6,858, an increase of 67% over 1967. I.C.C., *Report of Bureau of Policy Matters under Consideration by the Interstate Commerce Commission*, app. , Table 2 (1968). A motor carrier contemplating an application for temporary authority must know with reasonable certainty the extent compliance is required with the Commission's temporary authority regulations. The stake can be thousands of dollars for an individual carrier and millions when considered from an industry-wide standpoint. The need, therefore, is not merely for enlightenment at any period of time, but for some degree of stability. The unsettled condition of the law today requires settlement by this Court.

The critical importance to the for-hire motor carrier industry of the need for a decision on the status of the Commission's temporary authority rules and regulations [illegible] beyond the grant of temporary authority. A grant of temporary authority was held by this Court in *Pan-Atlantic S.S. Corp. v. Atlantic Coastlines [illegible] Co.*, 393 U.S. [illegible] to be a "proceeding" within the meaning of Section [illegible] of the Administrative Procedure Act, 5 U.S.C. [illegible] establishes rights and obligations [illegible] practical and legal consequences. Not [illegible] the application of vital service [illegible] of existing carriers, including those of [illegible] to the new competitive service thereby brought [illegible]. The serious nature of these consequences is [illegible] augmented by the so-called "temporary" nature of [illegible] service. Where, as in this case, the recipient of [illegible] authority [illegible] with the Commission an [illegible] application for permanent authority, grants of [illegible] authority, although ostensibly made for a period of [illegible] days only, in practice continued in effect by [illegible] Commission under the provisions of Section 9(b) of [illegible] A.P.A. until determination of the corresponding application for permanent authority. Applications of lesser [illegible] and complexity than that filed by Trans-American

have been in litigation before the Commission in excess of two years, and judicial review can add one or more additional years, the temporary authority remaining in effect all the while. As a consequence, appellants are not faced with a temporary situation in any sense of the word.

5. The Commission relied upon 387 supporting shipper and receiver letters (362 initially filed, 25 additional letters filed October 30, 1967) as the basis for the grant of temporary authority to Transamerican in December, 1967. Between October, 1967, and September 19, 1969, when the lower court issued its memorandum opinion, an exhaustive hearing encompassing weeks of testimony and hundreds of exhibits, was held by a hearing examiner for the Interstate Commerce Commission on Transamerican's application for permanent authority into the same territory sought by this temporary authority application. During that hearing, full opportunity was afforded to demonstrate that the application should be granted. Nevertheless, approximately 70% of the shippers and receivers who submitted letters more than two years ago stating a need for immediate motor carrier service did not even appear at the hearing to buttress their letter-support of many months previous. In late August, 1969, the examiner issued an extensive report which found that public convenience and necessity did

See, *W. J. Digby, Inc., Extension—Service Points*, 98 M.C.C. 779 (1964) (corporations for 2 years; in another proceeding involving Railway Express, Docket No. MC-61592, Sub-Nos. 1947, 1947, and 1948, styled *Railway Express Service, Incorporated, Extension—Charleston*, Railway Express filed applications for permanent authority in March and April, 1963, corresponding to temporary authority previously granted. An examiner's report and recommended order were served April 17, 1967, and he recommended that the application be denied, except with respect to shipments weighing less than 1,000 pounds. That proceeding is still pending on exceptions before the Commission, and Railway Express continues to operate under temporary authority.

not require the grant of authority requested by Transamerican, and he recommended that the application be denied in its entirety. In so doing, he concluded that (1) Transamerican's proposed service was not realistic particularly since it involved such a large geographical area; (2) that a grant of the authority sought would have an adverse impact upon protestants that have large investments in terminals, operating rights, and equipment, and that these protestants have equipment which is not operated at full capacity, even though they all solicit additional traffic; (3) that the application embraced all of the important industrial points in the Southeastern territory where protestants are now providing reasonably satisfactory service; and (4) that if authorized, Transamerican would be in a position to divert a substantial amount of the "cream" of the traffic moving to and from points in the Southeastern territory and would leave to protestants the undeveloped rural areas in the three States which again could be served only at a financial loss. (Sh. 26)

As noted earlier, before the lower court's order sustaining the Commission was entered, appellants petitioned the Commission requesting that the proceeding be reopened for the receipt of this new evidence and for reconsideration of its original order. The petitions were summarily denied on October 17, 1969, and appellants' motion for new trial and other appropriate relief before the lower court was subsequently denied on October 22, 1969.

It has been argued below that administrative action must have an end at some point in time, and, therefore, the Commission has correctly refused to reconsider recent events having a bearing upon its original decision, which is the subject of this appeal. Such an argument has no application, however, to an order such as that in issue here, and which, by its very nature, compels ad-

ministrative review at any time before it is declared judicially final. Clearly, the Commission and the lower court had a duty to reconsider whether in October, 1969, almost two years after the initial order granting temporary authority issued, this "immediate and urgent" need still existed for Transamerican's proposed service.

This Court has held that the Commission must give further consideration to its decisions if changed circumstances so alter the complexion of a case that reconsideration is required; and the lower court should remand the case to the Commission for that purpose. *Bar-lington Truck Lines v. U. S.*, 371 U.S. 156, 172 (1962). There, as here, the decision in issue was still under review, and had not become final. Thus, no valid reason existed for failing to reconsider all circumstances relating to the efficacy of the instant Commission decision. In reviewing the Commission's most recent action of October 17, 1969, and, thereupon, refusing to require that the proceeding be reopened for the consideration also of new evidence bearing heavily upon the initial Commission decision, the court below was clearly in error.

CONCLUSION

For the reasons stated, appellants submit that the questions presented by this appeal are of substantial importance and warrant plenary consideration by this Court upon briefs and oral argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

Civil Action File No. 3759

BELL LINES, INC., a corporation, ROADWAY EXPRESS, INC., a corporation, McLEAN TRUCKING COMPANY, a corporation, SMITH'S TRANSFER CORPORATION OF STAUNTON, VIRGINIA, a corporation, and HUBER & HUBER MOTOR EXPRESS, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

TRANSAMERICAN FREIGHT LINES, INC.,

Intervening Defendant.

MEMORANDUM

In this action the original complainants, five interstate public service motor carriers, seek to enjoin, set aside and annul an order of the Interstate Commerce Commission granting to Transamerican Freight Lines, Inc., also an interstate public service motor carrier, temporary authority to substantially expand its motor carrier services in eastern United States. The United

States of America and the Interstate Commerce Commission are party defendants and Transamerican Freight Lines, Inc., is an intervening defendant. Fifteen other interstate public service motor carriers subsequently intervened as plaintiffs. All of these carriers have authority from the Commission to render interstate motor carrier services.

In June, 1967, Transamerican applied to the Commission for temporary authority, pursuant to provisions of 28 U.S.C.A., Section 310a, to transport general commodities over various routes between points established in its existing Commission authority and points in North Carolina, South Carolina and Georgia. Notice of the application was published in the Federal Register and more than forty motor carriers registered their written protests with the Commission. By order of the Commission's Temporary Authorities Board, dated July 19, 1967, Transamerican's temporary authority was denied on the finding that the application did not establish an immediate and urgent need for the expanded services. Transamerican petitioned for reconsideration on August 10, 1967, but was again denied by the September 27, 1967, order of the Commission's Division 1, acting as an Appellate Division.

Transamerican, on October 30, 1967, filed with the Commission a "Petition for Receipt of Additional Evidence and for Reconsideration of the Order of Division 1." By order of December 5, 1967, the Commission's Division 1, acting as an Appellate Division, vacated and set aside its September 27, 1967, order, found immediate and urgent need for the motor carrier services sought to be rendered by Transamerican and that there was no carrier service available capable of meeting such need, and granted Transamerican the requested temporary authority, detailed as to areas to be served, conditioned upon compliance with Commission requirements generally applicable to motor carriers. This order was served

December 11, 1967. On December 14 plaintiffs filed a petition requesting a stay of the effective date of the order. On December 15 plaintiffs filed their complaint in this Court and on that date the Court, after hearing, issued a temporary restraining order for maintenance of the status quo until a hearing by a court of three judges on December 19 on plaintiffs' request for an injunction. Also on December 15 the Commission ordered a stay of the temporary authority grant until December 31, 1967. On December 19 the proceedings were continued until the further order of the Court. Many of the protesting motor carriers filed petitions with the Commission for reconsideration of the December 5 order and Transamerican filed a reply and a supplemental reply thereto. The Commission, on December 29, denied the relief sought in plaintiffs' petitions for reconsideration and extended the stay of the temporary authority grant until January 5, 1968. By letter of January 3 the Commission rejected a petition by plaintiffs seeking announcement that these proceedings involved a matter of general transportation importance. On January 5 the Court issued a temporary restraining order for maintenance of the status quo until the convening of the three-judge court on January 19. Also, on January 5 plaintiffs filed a supplemental complaint. The Joint Answer of the United States of America and of the Interstate Commerce Commission to plaintiff's Complaint and Supplemental Complaint was filed January 15. On January 19, 1968, after a plenary hearing, this Court of three judges ordered that the temporary restraining order entered on January 5 remain in effect until the further order of the Court. This chronology of proceedings and developments will contribute to an understanding of the pertinent facts and principles of law that must be considered in resolving the controversy before the Court.

Transamerican Freight Lines, Inc., with operating headquarters in Detroit, by application dated June 2, 1941, sought temporary authority from the Interstate Commerce Commission to transport general commodities, with some exceptions, between Transamerican's existing Mid-West motor carrier routes, stretching from Massachusetts, Connecticut and New York through Illinois, Indiana, Michigan, Ohio and Pennsylvania to Iowa, Nebraska and Oklahoma and areas to the south over new routes extending into North Carolina, South Carolina and Georgia. The application was accompanied by detailed listing of points to be served together with maps showing proposed new carrier service routes. Later, on August 6, 1941, Transamerican filed its application with the Commission for permanent motor carrier authority, a matter to be noted but not here involved.

The temporary authority areas proposed to be served by Transamerican are in the territory presently served by one or more of the original plaintiffs in the action or by one or more of the later intervening plaintiffs. [illegible] with operating headquarters at Charleston, West Virginia; Eastern Express, Inc., with headquarters at Elyria, Ohio; McLean Trucking Company, with headquarters at Winston-Salem, North Carolina; [illegible] Transfer Corporation of Staunton, Virginia; and United & Hulse Motor Express, Inc., with headquarters at Louisville, Kentucky, the four original motor carrier plaintiffs [illegible] action along with other motor carriers in the areas proposed to be served by Transamerican's temporary authority, protested the Commission's grant of authority [illegible] Transfer Corporation is not added as an original participant in the proceedings. The Commission, acting by its subcommittee, initially denied the grant but on reconsideration granted the temporary authority by its order of December 4, 1941, affirmed by its order of [illegible]

Trans-american, the applicant, supported its application to the Commission with numerous statements indicating the need for the carrier services sought and asserting otherwise in various expressions that existing carrier services were inadequate, were unavailable or were declining to serve. These statements in the form of letters accompanied and supplemented the application in accordance with Rules of the Commission relating to information required of the applying motor carrier (49 C.F.R., Section 210.2 now 49 C.F.R. Section 1042).

Plaintiffs ask the Court to declare the orders of the Commission granting the temporary authority to Trans-american to be null and void. In their brief, pages 17-18, they ask in the alternative that the Court remand the proceedings to the Commission with instructions to the Commission to reveal the authority and basis of its action and to make statements justifying and explaining its action in granting the temporary authority.

The intervening defendant, Transcontinental, argues [illegible] of its memorandum, expresses its opinion that plaintiffs are attempting to have the Court interfere in judgment, that the statute explicitly authorizes the Commission to make [illegible] Further Transcontinental, at page 10 of its memorandum, alleges that the statements or letters supporting its application "were instances of lack of available equipment, refusal to pick up shipments, excessive delays in transit, failure to distribute equipment and tariff and traffic restrictions prohibiting use of the services".

Plaintiffs filed their complaint in this court and [illegible] that a court of three judges be convened pursuant to the provisions of [illegible] Section 2325 [illegible] and [illegible] Section 1336 [illegible] Section 1398 and [illegible]

Mo. 1967); *Merchants Indemnity Co. v. United States*, 253 F. Supp. 506 (W.D. Mo. 1966); *Hussey v. United States*, 251 F. Supp. 630 (N.D. Cal. 1967). Compare, *Cappadora v. Celebrezze*, 356 F.2d 1 (3d Cir. 2d 1966).

The Court does not find in the Commission's action any enlargement and expansion of Commission power and authority, as viewed in plaintiffs' brief, page 23, to be "a far cry from that envisioned by Congress in 1938 when Section 210(a)(5) was enacted."

[illegible] of the Commission

In Part V of their original Complaint, as amended by Part III of their Supplemental Complaint, Plaintiffs complain that the Commission's action was improper and not in accordance with the law, particularly referring to the orders of December 5 and December 20, 1967. The Commission's order of December 5 vacated and set aside its order of September 27 which had refused Transamerican the temporary authority requested. The December 5 order found that "there is an immediate and urgent need for the motor carrier service described in the appendix hereto, and that there is no carrier service available capable of rendering such need." The Commission thereupon granted the grant of temporary authority to Transamerican [illegible] upon Transamerican's compliance with [illegible] requirements incident to motor carrier service. The Commission's order of December 20 declined to [illegible] plaintiffs' petition or petition for reconsideration of the December 5 order which was [illegible]

Plaintiffs [illegible] in their brief, page 6 [illegible]

[illegible] the ultimate questions of law require this Court to determine whether the Interstate Commerce Commission [illegible] in excess of statutory authority and whether it abused its discretion in ultimately approving [illegible] application for temporary authority.

ily and erroneously disregarding the procedural requirements promulgated by the Commission in Ex Parte MC-67, *Motor Carrier Temporary Authorities*, 49 C.F.R. 240.6, and contained in the Commission's General and Special Rules of Practice.

"(a) They grant Transamerican temporary authority to provide services to and from points for which no evidence whatsoever was adduced.

"(b) They grant Transamerican temporary operating authority to transport numerous commodities to and from points for which no evidence whatsoever was adduced.

"(c) They fail to consider and dispose of material issues of fact and law properly presented by plaintiffs and others similarly situated, and particularly the issues raised by the various motions to reject or strike Transamerican's Petition for Receipt of Additional Evidence and Reconsideration of the Order of Division 1 on the grounds that under the Commission's Rules no such petition would lie.

"(d) They are inadequate, incomplete, inconsistent, and erroneous on their face, because they fail to comply with the requirements of Section 8 of the Administrative Procedure Act, 5 U.S.C. 1007, in that the orders do not contain a statement of the findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

"(e) That deprive plaintiffs of their property without due process of law as a result of the errors hereinabove stated, in that Transamerican as a result of such errors is authorized by the orders to provide transportation services and derive revenues therefrom of which revenues plaintiffs will be divested."

Plaintiffs' allegations (a) and (b) state propositions contrary to the findings of the Commission in its December 5 order, affirmed in its December 29 order. Vested in the Commission by the statute (49 U.S.C.A., Section 310a) is the discretion to grant temporary authority for carrier service "for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need." Plaintiffs assert that existing motor common carrier services are capable of meeting the transportation needs in the areas for which the temporary authority was granted to Transamerican. However, in keeping with Commission Rules relating to applications for temporary authority, many written statements of shippers and receivers were filed in support of Transamerican's application. With Transamerican's petition for reconsideration, additional statements were filed with the Commission. While it is not the duty of this Court in these proceedings to read all of these letters, a sufficient number has been examined to verify the fact that some of them affirmatively deny the existence of available carrier services capable of meeting the needs in areas covered by the grant of authority while other letters affirm the fact that certain motor carriers have refused to render service desired by shippers and receivers. The Government's brief, page 15, notes with reference to the Commission's Rules on statements supporting applications for temporary authority that:

> ". . . These rules were designed to aid shippers and carriers in the filing of applications. They were not intended as rigid limits upon the Commission's discretion nor to revive 19th century common law pleading practices in Commission cases. That the eleven criteria are guides and not absolute requisites in every case is apparent from their own terms, which, under a literal or technical approach would preclude many, if not most, otherwise meritorious applications. The Commission has consistently ap-

plied this liberal interpretation of its rules as being complete compliance. . . ."

The Commission compiled a 12-page chart of the letter statements accompanying Transamerican's application. The statements were checked with the eleven requirements of the Rules. The record discloses that each of the eleven requirements was checked a varying number of times. Some of the requirements may not have been applicable and pertinent or may not have been appropriate bases for responses by some of the writing shippers or receivers. The court of three judges in *Roadway Express, Inc. v. United States*, 262 F. Supp. 154, 159 (N.D. Ohio 1966), aptly observed:

> ". . . Moreover, a reading of these rules indicate that their purpose is to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority."

A presumption of validity accompanies orders of the Commission. A party attacking an order has the burden of showing its invalidity. *Hughes v. United States*, 278 F. Supp. 11 (D. Pa. 1967); 13 Am. Jur. 2d, *Carriers*, Section 60. The Commission obviously granted the temporary authority here after considerable filtering. The application and supporting letters, considered alone with all other record information including the several motor carrier protests, are presumed to have contained a sufficient showing for the grant. In view of the discretion vested by the Congress in the Commission, the nature and application of the Commission's rules, and the record information before the Commission, the Court is unable to say that the grant of the temporary authority to Transamerican was arbitrary or capricious action or action in abuse of discretion.

Allegations (c), (d), (e), (f), and (g) are found to be without merit. The Court is satisfied that the Com-

mission acted within the discretion vested in it by law. Plaintiffs, by recent communication with copies to counsel of record, cite the recently decided case of *Acme Cartage Co. v. United States*, supra, wherein the opinion of the court of three judges of the Western District of Washington holds that the Commission's action was arbitrary and capricious in that it ignored or waived compliance with the rules relating to contents of statements supporting the application for temporary authority, 49 C.F.R., Section 240.2(e), now 49 C.F.R., Section 1131.2 (e), and more particularly requirements of Section 240.2 (e)(8) and (9), now Section 1131.2(e)(8) and (9). These subsections call for information from the letter writers as to whether they made efforts to obtain carrier service from existing motor carriers in their respective areas and, if so, the names and addresses of the carriers failing or refusing to provide the services required, together with the reason or reasons given for such failure or refusal. The court examined the letter statements and found "none of them approaches compliance with, or provides the information required by" subsections (8) and (9) above referenced. Nor did the court find the information elsewhere in the record. On the other hand, the court noted that certified carriers in the area had protested the grant of temporary authority to the applicant and had asserted "ability and willingness to provide the needed carrier service in question."

The court considered the Commission's failure to require compliance with the rules in the *Acme Cartage Co.* case as constituting capricious and arbitrary action and accordingly held the Commission's temporary authority orders to be null and void.

In the case under consideration here, plaintiffs in their brief, pages 31-36, discuss the rules relating to the content of the supporting letters, assert that Transamerican's application was deficient, and complain that the Commission has not yet set forth or explained its reasons

for permitting departure from the requirements of its rules. The case presently before the Court does not fit into the context of the *Atomic Cartage Co. case*, as above reviewed. In this case some of the many letters respond to every requirement of the rules, as shown by the Commission's 42-page chart above mentioned. In *Roadway Express, Inc. v. United States*, 263 F. Supp. 154 (N.D. Ohio 1966), the question was raised as to the quality of the supporting letters when they become greatly stereotyped, a tendency almost certain to develop when responding methodically to the eleven requirements of the rules. In the *Roadway Express* case the court concluded that "the repetition of this apparent 'lock statement' goes to the weight of such statements and to its legal sufficiency." Each shipper's and each receiver's need and situation calling for motor carrier service will differ in some degree. This is well illustrated by *Yates Express Line's v. United States* et al., 262 F. Supp. 542 (E.D. Va. 1966). The variation in and the contents of the many letters filed in support of Transamerican's application add credit and weight to the record base on which the Commission's grant of temporary authority rests. Letters supporting applicant's Petition for Reconsideration of the Order of the Temporary Authorities Board, as filed with the Commission on August 10, 1967, indicated some motor carriers had moved to correct and cure some of the alleged defect in carrier service and had thereby precipitated some added problems in transportation. While the Court does not purport to probe the thought process of Commission personnel, deliberations can be affected and changes properly brought about when the many items and factors of a proliferating record are analyzed and weighed in totality.

Wherefore, it is the opinion of the Court that the Commission acted arbitrarily and capriciously and not in accordance with law by failing and refusing to reject or strike Trans-American's Petition for Receipt of Additional Evidence and Reconsideration of the Order of Division 1

on the grounds that under the Commission's Rules no such petition would lie. Plaintiffs' brief, pages 26-41, treats these matters under the heading of "Procedural Errors." Reference is there made to the Commission's Rules of Procedure, particularly 49 C.F.R., Section 1.101 (f) and (g), relating to reconsideration of inter-agency action prior to issuance of the Commission's order. The Court's review of the procedures here employed and the Rules of the Commission relating thereto, does not find merit in plaintiffs' position. Plaintiffs' helpful appendix to their brief at page 55, quotes 49 C.F.R., Section 1.2, and at page 75, quotes 49 C.F.R., Section 240.6 embodying Rules of the Commission persuasively pertinent here. Indeed the inter-agency consideration and reconsideration constitute essential ingredients of the administrative process and provide the means of testing and retesting and weighing and reweighing the various factors which ultimately contribute to the shaping of the agency's final institutional decision. See *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 428, 95 L. Ed. 391 (1951); Davis, *Administrative Law*, Sections 11.01 through 11.21. We are mindful of plaintiffs' arguments, brief, pages 26-31, on this point, but do not find them persuasive. For example, we do not find *Upjohn Co. v. Pennsylvania Railroad Co.*, 351 F. 2d 4 (6th Cir. 1965), cited as a recent case, to be pertinent.

Allegation (c) asserts that the Commission action was erroneous because of failure to comply with requirements of Section 8 of the Administrative Procedure Act, 5 U.S.C.A., Section 1007 (now 5 U.S.C.A., Section 557) that orders contain a statement of findings and conclusions, together with the reason or basis therefor. Obviously these requirements of the Administrative Procedure Act do not apply to the Commission's temporary authority orders here considered. In temporary authority cases the Commission acts in an administrative and largely without hearings or other proceedings. In its December 5 order, affirmed in its December 29 order, the Com-

fin, Ga., thence over U. S. Highway 41 to junction U. S. Highway 23 near Forsyth, Ga., thence over combined U. S. Highway 41 and 23 to Macon, Ga., thence over U. S. Highway 80 to Columbus), and return over the same routes, serving the intermediate points of Atlanta, Athens, Macon, Manchester, and Griffin, Ga., Greenville, S. C., Gastonia, Charlotte, and Winston-Salem, N. C., and the off-route points of Rome, Dalton, Calhoun, La Grange, Hedges, Plainville, Warner-Robins, Warner-Robins Air Force Base, Augusta, and Savannah, Ga., Wilmington, Goldsboro, and Rocky Mount, N. C., points in Charleston, Berkley, and Dorchester Counties, S. C., and points in North Carolina and South Carolina on and west of U. S. Highway 301.

c. From Pittsburgh, Pa., to Wytheville, Va., as described in (1) (a) above, thence over U. S. Highway 11 to Bristol, Tenn., (also from Pittsbugh over Interstate Highway 81 to Bristol), thence over U. S. Highway 11W to Knoxville, Tenn., thence over combined Interstate Highways 40 and 75 to junction U. S. Highway 27 near Harriman, Tenn., thence over U. S. Highway 27 to Chattanooga, Tenn., thence over combined U. S. Highways 41 and 76 to junction U. S. Highway 41 and U. S. Highway 76 at Dalton, Ga., thence over U. S. Highway 41 to Atlanta, Ga., thence to Columbus, Ga., as described in (1) (b) above, and return over the same routes, serving the Intermediate points of Dalton, Calhoun, Atlanta, Macon, Manchester, and Griffin, Ga., and the off-route points of Rome, Plainville, Hedges, La Grange, Warner-Robins, Warner-Robins Air Force Base, and Athens, Ga.

(2) Between Newcomerstown, Ohio, and Columbus, Ga.:

From Newcomerstown over U. S. Highway 21 (also over Interstate Highway 77) to Charleston, W. Va., thence over combined Interstate Highways 64 and 77 (West Virginia Turnpike) to junction Interstate Highway 77 and Interstate Highway 64, thence over Interstate Highway 77 to junction combined U. S. Highways 219 and 460 near Princeton, W. Va., thence over combined U. S. Highways 219 and 460 and combined U. S. Highways 19 and 460 to Bluefield, W. Va., thence to Columbus, Ga., as described in (1) above, and return over the same routes, serving Newcomerstown, Ohio, for purposes of joinder only and serving the intermediate points of Dalton, Calhoun, Manchester, Atlanta, Griffin, Macon, and Athens, Ga., Greenville, S. C., Gastonia, Charlotte, and Winston-Salem, N. C., and the off-route points of Rome, Dalton, Calhoun, Plainville, Hedges, La Grange, Manchester, Augusta, Athens, Savannah, Warner-Robins, and Warner-Robins Air Force Base, Ga., Wilmington, Goldsboro, and Rocky Mount, N. C., points in Charleston, Berkley, and Dorchester Counties, S. C., and points in North Carolina and South Carolina on west of U. S. Highway 301.

(3) Between Athens, Ohio, and Columbus, Ga.:

From Athens over U. S. Highway 33 to junction Ohio Highway 7, thence over Ohio Highway 7 to junction U. S. Highway 33, thence over U. S. Highway 33 to junction U. S. Highway 21 (also junction Interstate Highway 77) near Ripley, W. Va., thence over U. S. Highway 21 (also Interstate Highway 77) to Charleston, W. Va., thence to Columbus as described in (2) above, and return over the same routes, serving Athens, Ohio for purposes of joinder only and serving the intermediate and off-route points named in (2) above.

(4) Between Cincinnati, Ohio, and Columbus, Ga.:

a. From Cincinnati over U. S. Highway 25 to Lexington, Ky., (also from Cincinnati over combined Interstate Highways 71 and 75 to junction Interstate Highway 71 and Interstate Highway 75, thence over Interstate Highway 75 to Lexington) thence over U. S. Highway 27 to Chattanooga, Tenn., thence over combined U. S. Highways 41 and 76 to junction U. S. Highway 41 and U. S. Highway 76 at or near Dalton, Ga., thence over U. S. Highway 41 to Atlanta, Ga., thence to Columbus as described in (1) above, and return over the same routes, serving the intermediate and off-route points named in (1) (c) above.

b. From Cincinnati, Ohio, to Lexington, Ky., as described in (4) (a) above, thence over combined U. S. Highways 421 and 25 to junction U. S. Highway 421 and U. S. Highway 25 at or near Terrill, Ky., thence over U. S. Highway 25 to Corbin, Ky., thence over U. S. Highway 25W to Knoxville, Tenn., thence over U. S. Highway 129 to junction U. S. Highway 411 at Maryville, Tenn., thence over U. S. Highway 411 to junction U. S. Highway 41 near Cartersville, Ga., thence over U. S. Highway 41 to Atlanta, Ga., thence to Columbus, Ga., as described in (1) above, and return over the same routes, serving the intermediate points of Atlanta, Macon, Griffin, and Manchester, Ga., and the off-route points of La Grange, Athens, Warner-Robins, and Warner-Robins Air Force Base, Ga.

c. From Cincinnati, Ohio, over U. S. Highway 52 to Bluefield, W. Va., thence to Columbus, Ga., as described in (1) (a) and (b) above, and return over the same routes, serving the

intermediate and off-route points named in (1) (a) and (b) above.

d. From Cincinnati, Ohio, to Lexington, Ky., as described in (4) (a) above, thence over combined U. S. Highways 421 and 25 to junction U. S. Highway 421 and U. S. Highway 25 at Terrill, Ky., thence over U. S. Highway 421 to junction U. S. Highway 421 and U. S. Highway 58 at Dot, Va., thence over combined U. S. Highways 421 and 58 to Bristol, Tenn., thence over U. S. Highway 421 to Winston-Salem, N. C., thence to Columbus, Ga., as described in (1) (a) and (b) above, and return over the same routes, serving the intermediate and off-route points named in (1) (a) and (b) above.

e. From Cincinnati, Ohio, to Corbin, Ky., as described in (4) (b) above, thence over U. S. Highway 25E to Newport, Tenn., thence over combined U. S. Highways 25 and 70 to Asheville, N. C., thence over U. S. Highway 25 to Greenville, S. C., thence to Columbus, Ga., as described in (1) (a) and (b) above, and return over the same routes, serving the intermediate points of Atlanta, Athens, Macon, Griffin, and Manchester, Ga., Greenville, S. C., Asheville, N. C., and the off-route points of Rome, Dalton, Calhoun, Hedges, Plainville, La Grange, Manchester, Savannah, Augusta, Warner-Robins, and Warner-Robins Air Force Base, Ga., points in Charleston, Berkley, and Dorchester Counties, S. C., and points in North Carolina and South Carolina on and west of U. S. Highway 301.

f. From Cincinnati, Ohio, to Asheville, N. C., as described in (4) (e) above, thence over U. S. Highway 74 to junction U. S. Highway 29 near Kings Mountain, N. C., thence over

combined U. S. Highways 74 and 29 to Charlotte, N. C., thence to Columbus, Ga., as described in (1) (a) and (b) above, and return over the same routes, serving the intermediate points of Atlanta, Athens, Macon, Griffin, and Manchester, Ga., Greenville, S. C., and Charlotte, Gastonia, and Asheville, N. C., and the off-route points of Rome, Dalton, Calhoun, Hedges, Plainville, La Grange, Manchester, Savannah, Augusta, Warner-Robins, and Warner Robins Air Force Base Ga., Wilmington, N. C., points in Charleston, Berkley, and Dorchester Counties, S. C., and points in North Carolina and South Carolina on and west of U. S. Highway 301.

(5) Between Louisville, Ky., and Columbus, Ga.:

a. From Louisville over U. S. Highway 60 to Lexington, (also from Louisville over Interstate Highway 64 to Lexington), thence to Columbus, as described in (4) (a), (b), (d), and (f) above, and return over the same routes, serving the intermediate and off-route points named in (4) above.

b. From Louisville, Ky., over U. S. Highway 60 (also over Interstate Highway 64) to junction U. S. Highway 127 west of Frankfort, Ky., thence over U. S. Highway 127 to junction U. S. Highway 150 at Danville, Ky., thence over U. S. Highway 150 to junction U. S. Highway 25 at Mt. Vernon, Ky., thence over U. S. Highway 25 to Corbin, Ky., thence to Columbus, Ga., as described in (4) (b), (e), and (f) above, and return over the same routes, serving the intermediate and off-route points named in (4) (b), (e), and (f) above.

Serving in connection with each of the above-described routes points within 15 miles of Atlanta, Ga., except with respect to route (1) (a)

above, and points within 5 miles of Macon and Columbus, Ga., restricted against service between points in North Carolina, South Carolina, and Georgia.

Carrier is authorized to tack and combine the authority herein with present authorized operations at Pittsburgh, Pa., Newcomerstown, Athens, and Cincinnati, Ohio, and Louisville, Ky., and to interline with other carriers, thereby negating the restrictions in the second ordering paragraph herein.

APPENDIX D

TA-DEN.-1

SERVICE DATE
JULY 21, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Temporary Authorities Board, held at its office in Washington, D. C., on the 19th day of July, A. D. 1967.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Re: Request to transport general commodities with specified exceptions between specified points in Pennsylvania, Georgia, West Virginia, North Carolina, South Carolina, Tennessee, Ohio, Kentucky and Virginia.

Application by the above-named applicant filed under Section 210a(a) of the Interstate Commerce Act, as amended, for temporary authority to operate as a motor carrier, in interstate or foreign commerce, being under consideration, and

It appearing, That the said applicant has not established that there exists an immediate and urgent need for any of the service proposed;

It is ordered, That the said application be, and it is hereby, denied.

By the Commission, Temporary Authorities Board.

H. NEIL GARSON,
Secretary.

[SEAL]

NOTICE TO PARTIES: Special Rules of Practice Governing Procedure of the Temporary Authorities Board provide that petitions for reconsideration of the action of the said Board may be filed within 20 days following service of notice of such action. The Commission requires that the original and six copies of each such petition shall be filed and also a statement certifying that one copy has been served on each party of record in the proceeding.

APPENDIX E

SERVICE DATE
SEPTEMBER 29, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 27th day of September, 1967.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed August 10, 1967, for reconsideration of the order of the Commission, Temporary Authorities Board, dated July 19, 1967, denying temporary authority herein;

(2) Replies by Ellis Trucking Co., Inc., R. C. Motor Lines, Inc., Dixie Ohio Express, Inc., Mercury Motor Express, Inc., Floyd & Beasley Transfer Company, Inc., Overnite Transportation Company, The Mason and Dixon Lines, Incorporated, Tower Lines, Inc., Roadway Express, Inc., Ryder Truck Lines, Inc., Terminal Transport Company, Inc., Eazor Express, Inc., Gordons Transports, Inc., Youngblood Truck Lines, Inc., joint replies by Hennis Freight Lines, Inc., et al, Bell Lines, Inc., et al, Harper Motor Lines, Inc., et al, Watkins Motor Lines, Inc., et al, and Great Lakes Express Company, et al, protestants, filed on various dates in August and September, 1967;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of July 19, 1967.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

[SEAL]

APPENDIX F

DIV-MISC.

SERVICE DATE
DECEMBER 18, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 15th day of December, 1967.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Upon consideration of the record in the above-entitled proceeding and of joint petition of Bell Lines, et al., protestants, filed December 14, 1967 for stay of the effective date of the order of the Commission, Division 1, acting as an Appellate Division, dated December 5, 1967 granting temporary authority herein, and good cause appearing therefor:

It is ordered, That the taking effect of the temporary authority granted in the order entered herein on December 5, 1967, and served on December 11, 1967, be, and it is hereby, stayed until December 31, 1967.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

[SEAL]

APPENDIX G-1

SERVICE DATE
DECEMBER 29, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of December, 1967.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Motions or petitions of Harper Motor Lines, Inc., et al., Tower Lines, Inc., Ryder Truck Lines, Inc., Pilot Freight Carriers, Inc., Roadway Express, Inc., Youngblood Truck Lines, Inc., and Eazor Express, Inc., and joint petitions of Great Lakes Express Company, et al., Hennis Freight Lines, Inc., et al., Bell Lines, Inc., et al., Watkins Motor Lines, Inc., et al., protestants, filed on various dates in December, 1967, (1) for reconsideration of the order of the Commission, Division 1, acting as an Appellate Division, dated December 5, 1967, granting temporary authority herein, and (2) for review by the entire Commission, oral argument, stay of the taking effect of temporary authority granted in Appellate Division 1's order of December 5, 1967, or for certain other relief:

(2) Reply by applicant filed December 26, 1967, and supplemental reply filed December 27, 1967;

It appearing, That no sufficient grounds or reasons have been advanced by petitioners which would warrant

(1) certification of this proceeding by Appellate Division 1 to the entire Commission for consideration or other action, (2) oral argument before Appellate Division 1, or (3) an indefinite stay of the taking effect of the temporary grant of authority in Appellate Division 1's order of December 5, 1967;

It further appearing, That a review of the record, in the light of the pleadings above mentioned, and all of the underlying evidence, shows that the prior grant made herein is appropriate and that the arguments raised by petitioners do not warrant a different result;

And it further appearing, That orderly procedure requires a short stay of the taking effect of the temporary grant of authority in Appellate Division 1's order of December 5, 1967, beyond the date contained in Appellate Division 1's order of December 15, 1967 extending said date; and good cause appearing therefor:

It is ordered, That the said motions and petitions, except to the extent granted in the next succeeding paragraph, be, and they are hereby, denied for the reasons set forth in this above paragraphs;

It is further ordered, That the taking of effect of the temporary authority granted in the said order of December 5, 1967, as extended by the order of December 15, 1967, be, and it is hereby, further extended until January 5, 1968.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

[SEAL]

APPENDIX G-2

D-370-MISC.

SERVICE DATE
JANUARY 2, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of December, 1967.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petitions of Tower Lines, Inc., Ryder Truck Lines, Inc., Pilot Freight Carriers, Inc., Roadway Express, Inc., Razor Express, Inc., and Youngblood Truck Lines, Inc., and joint petitions of Great Lakes Express Company, et al., Hennis Freight Lines, Inc., et al., Bell Lines Inc., et al., and Watkins Motor Lines, Inc., et al., protestants, filed on various dates in December, 1967, for reconsideration of the order of the Commission, Division 1, acting as an Appellate Division, dated December 5, 1967, granting temporary authority herein and for other relief;

(2) Reply by applicant filed December 26, 1967 and supplemental reply filed December 27, 1967;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied for the reason that no showing has been

made which would warrant a conclusion different from that reflected by the said order of December 5, 1967.

It is further ordered, That the taking effect of the temporary authority granted in the order entered herein on December 5, 1967, and served on December 11, 1967, be, and it is hereby, further stayed until January 5, 1968.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

[SEAL]

APPENDIX H

SERVICE DATE D-370
OCTOBER 17, 1969

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 17th day of October, 1969.

NO. MC 10761 SUB 215 TA

TRANSAMERICAN FREIGHT LINES, INC.
DETROIT, MICHIGAN

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Consolidated Freightways Corporation of Delaware, et al., joint petition of Hennis Freight Lines, Inc., et al., and joint petition of Bell Lines, Inc., et al., protestants, filed September 24, 1969, and October 1 and 3, 1969, respectively, for (1) reconsideration of the order of the Commission, Division 1, acting as an Appellate Division, dated December 5, 1967, granting temporary authority herein, and (2) reopening of the proceeding for the receipt of additional evidence and oral argument before the entire Commission;

(2) Replies by applicant, filed September 29, and October 14, 1969;

and good cause appearing therefor:

It is ordered, That the petitions be, and they are hereby, denied for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of December 5, 1967.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

[SEAL]

APPENDIX I

TEMPORARY OPERATION OF MOTOR CARRIER PROPERTIES PENDING ACTION ON APPLICATION FOR CONSOLIDATION, MERGER, AND SO FORTH

SEC. 210a. [*June 29, 1938, amended September 18, 1940, March 27, 1942, June 29, 1946.*] [*49 U.S.C. § 310a.*] (a)

To enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

49 C.F.R. 1131

TEMPORARY AUTHORITY RULES AND REGULATIONS

§ 1131.2

* * * *

(c) *Supporting statements.*—Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed

by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

[1131.6] *Petitions.*

(a) *Petitions for reconsideration.*—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(b) *Replies.*—Replies may be filed by any interested person to such petitions; but if the facts stated in any such petition disclose a need for accelerated action, such action, in the discretion of the Commission, may be taken before expiration of the time allowed for reply. Replies received after accelerated action on petition will be treated as petitions for reconsideration of the accelerated action and given corresponding accelerated action.

(c) *Petitions for reconsideration.*—The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

TITLE 49, CODE OF FEDERAL REGULATIONS—TRANSPORTATION CHAPTER 1—INTERSTATE COMMERCE COMMISSION SUBCHAPTER A—GENERAL RULES OF PRACTICE

REHEARING; REARGUMENT; OR RECONSIDERATION

§ 1.101 *Petitions for rehearing, reargument, or reconsideration.*

* * * * *

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of an original determination by a board of employees, any further petition for reconsideraton by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

* * * * *

ADMINISTRATIVE PROCEDURE ACT DECISIONS

SEC. 8. [*5 U.S.C.* § *557*] In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the

parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

CERTIFICATE OF SERVICE

I, Harry J. Jordan, an attorney for the Appellants and a member of the Bar of the Supreme Court of the United States, certify that a copy of Appellants' Jurisdictional Statement has been served by first-class mail, postage prepaid, upon the following parties:

1. The Honorable Erwin N. Griswold, Solicitor General, Walter B. Comegys, Acting Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D.C. 20530

2. Robert H. Ginnane, General Counsel, and Nahum Litt and Jerome Nelson, Attorneys, Interstate Commerce Commission, Washington, D. C. 20423

3. A. Alvis Layne and William Chestnutt, Attorneys for Transamerican Freight Lines, Inc., 915 Pennsylvania Building, Washington, D. C. 20004

4. W. F. Wunschel, Attorney, Post Office Box 1588, Charleston, West Virginia

Dated at Washington, D. C., this 28th day of November, 1969.

HARRY J. JORDAN
1000 - 16th Street, N. W.
Washington, D. C. 20036

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FILED
DEC 29 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 893

BELL LINES, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and TRANSAMERICAN FREIGHT LINES, INC., *Appellees*.

On Appeal from the United States District Court for the Southern District of West Virginia

MOTION TO AFFIRM

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December 1969

PRESS OF EYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Acme Cartage v. United States, 290 F. Supp. 453 (W.D. Wash. 1968) 4

American Farm Lines v. Black Ball Freight Service (No. 369, October Term, 1969) 4

Black Ball Freight Service v. United States, 298 F. Supp. 1006 (W.D. Wash. 1969), prob. juris. noted, No. 369, October Term, 1969, *sub nom. American Farm Lines v. Black Ball Freight Service*, No. 382, October Term, 1969, *sub nom. Interstate Commerce Commission v. Black Ball Freight Service* 4

Estes Express Lines v. United States, 292 F. Supp. 842 (E.D. Va. 1969), *aff'd per curiam*, 394 U.S. 718 (1969) 5

Interstate Commerce Commission v. Black Ball Freight Service (No. 382, October Term, 1969) 4

Interstate Commerce Commission v. Jersey City, 322 U.S. 503 (1944) 6

Resort Bus Lines, Inc. v. I.C.C., 264 F. Supp. 742 (S.D. N.Y. 1967) 6

Roadway Express, Inc. v. United States, 263 F. Supp. 154 (N.D. Ohio 1966) 5

Superior Trucking Co. v. United States, 302 F. Supp. 257 (N.D. Ga. 1969) 5

Upiohn Company v. Pennsylvania Railroad Company, 381 F. 2d 4 (6th Cir. 1967) 5, 6

Statute:

Interstate Commerce Act, 49 U.S.C. § 310a(a) 2

Miscellaneous:

Code of Federal Regulations, 49 C.F.R. § 1100.191(b) 5

IN THE

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BELL LINES, INC., ET AL., *Appellants,*

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On Appeal from the United States District Court for the Southern District of West Virginia

---

MOTION TO AFFIRM

Appellee, Transamerican Freight Lines, Inc. (Transamerican), pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court dismissing appellants' complaints attacking orders of the Interstate Commerce Commission.

The Commission, by order dated December 5, 1967, found an urgent and immediate need for motor carrier transportation of general freight between points and areas in the Midwest and Southeast. Acting under section 210a(a) of the Interstate Commerce Act,* the Commission issued to Transamerican a temporary authority to provide the needed service. Appellants opposed the temporary authority application before the Commission claiming their services to be adequate for reasonable public needs and that the grant of temporary authority to Transamerican would divert a substantial part of their businesses. After the Commission had denied petitions seeking reconsideration of the action, appellants brought action in the court below to invalidate the temporary authority. Appellants requested and obtained from the District Court orders restraining operations under the temporary authority pending decision on appellants' complaints.

---

* 49 U.S.C. § 310a(a). The section provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

The District Court released its unanimous opinion sustaining the action of the Commission on September 19, 1969. Appellants thereupon requested the District Court to postpone entry of judgment vacating the order restraining operations so that appellants might again seek Commission reconsideration of the order granting temporary authority. Petitions requesting reconsideration were filed with the Commission by various of the appellants on September 24, October 1, and October 3, 1969. The petitions sought the Commission to revoke the temporary authority because a trial examiner had recommended denial of corresponding permanent authority for Transamerican and because of changes in carrier operations during the extended period of the District Court proceedings. Transamerican replied to these petitions. Attached to the reply were certified statements of shippers and receivers reiterating their need for service and the inadequacy of existing services. The Commission, by order dated October 17, 1969, found that "... no showing has been made which would warrant a conclusion different from that reflected by the said order of December 5, 1967" and denied the petitions for reconsideration. The District Court on October 22, 1969, after oral argument, denied a request that the Court compel the Commission to revoke the temporary authority for the reasons the Commission had rejected in the order of October 17, 1969. The District Court, also on October 22, 1969, directed entry of judgment in conformity with its opinion of September 19, 1969. After further oral argument, the District Court also denied appellants' request for a stay pending appeal, but stayed the order of the Commission until November 21, 1969 so that appellants might seek a further stay from a Justice of this Court.

Appellants filed notice of appeal October 30, 1969. Appellants' application for a further stay pending appeal was presented to the Chief Justice and was denied by him on November 21, 1969.

ARGUMENT

The decision of the District Court is plainly correct and should be affirmed without further argument.

1. Appellants argue that the shipper statements submitted to the Commission in support of the application for temporary authority did not furnish the detailed information specified in the Commission rules. On this basis appellants urge that the present case is like *Interstate Commerce Commission* v. *Black Ball Freight Service* (No. 382, October Term, 1969), *American Farm Lines* v. *Black Ball Freight Service* (No. 369, October Term, 1969). Appellants are wrong. The present case presents a substantially different factual situation than the *Black Ball* and *American Farm Lines* cases. The lower court in *Black Ball* noted that the statements before the Commission contained *no* evidence that the shippers supporting the application for temporary authority had attempted to use existing carriers. *Acme Cartage* v. *United States*, 290 F.Supp. 453 at 457; *Black Ball Freight Service* v. *United States*, 298 F. Supp. 1006 at 1011. In the present case, a great number of the statements complied with the most technical reading of the Commission rules as to information to be supplied. Others, while not furnishing every item specified in the rules, outlined transportation difficulties and problems with existing service sufficient to alert the Commission to shipper needs. The District Court specifically noted in its opinion that:

> While it is not the duty of this Court in these proceedings to read all of these letters, a sufficient

> number has been examined to verify the fact that some of them affirmatively deny the existence of available carrier services capable of meeting the needs in areas covered by the grant of authority while other letters affirm the fact that certain motor carriers have refused to render service desired by shippers and receivers. (Jurisdictional Statement, Appendix A, p. 31)

The lower court's decision sustaining the action of the Commission under the circumstances presented here accords with the interpretation and application of the Commission's temporary authority rules by other district courts. *Estes Express Lines* v. *United States*, 292 F.Supp. 842 (E.D. Va. 1969), *aff'd per curiam*, 394 U.S. 718 (1969); *Roadway Express, Inc.* v. *United States*, 263 F.Supp. 154 (N.D. Ohio 1966); *Superior Trucking Co.* v. *United States*, 302 F.Supp. 257 (N.D. Ga. 1969).

2. Appellants assert that the action of the Commission during the course of the administrative proceeding receiving and acting upon a petition by Transamerican requesting reconsideration in light of new and additional evidence violated the Commission's rules of practice. Appellants claim that *Upjohn Company* v. *Pennsylvania Railroad Company*, 381 F.2d 4 (6th Cir. 1967), prohibits such reconsideration. Appellants are wrong again. The Commission's rules of practice authorize a party to submit new and additional evidence as a basis for reconsideration of a prior ruling. 49 C.F.R. § 1100.101(b). Appellants, in fact, also filed successive petitions for reconsideration when, following the decision of the District Court, they requested the Commission to reconsider and revoke the temporary authority. *Upjohn* involved wholly different facts. In

Upjohn, the Court of Appeals refused to allow the Commission to reopen a reparation case after the lapse of three years and to reach a different result because of a change in Commission policy. The action of the Commission in reconsidering its order in this case is fully supported by *Resort Bus Lines, Inc. v. I.C.C.*, 251 F.Supp. 742 (S.D. N.Y. 1967). Rules of procedure should not be an obstacle to an informed decision. The Commission's rules of procedure should be interpreted and applied so as to permit a decision based on all available evidence.

2. Appellants argue that the grant of temporary authority must be revoked because during the delay of 10 months between argument and disposition of the case by the District Court (a) various carrier mergers and grants of operating authority occurred that allegedly improved service and (b) a Commission examiner recommended that a corresponding permanent application of Transamerican be denied. These arguments were presented to and rejected by the Commission and the District Court. Carrier changes always occur during the period necessary to complete the judicial review sought by the opponents to the grant of temporary authority. Such changes are not grounds for judicial reversal of the Commission's decision. *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 514-515 (1944). The examiner's report is but one step in the administrative process. The examiner's recommendation is subject to agency review and it may or may not be adopted by the Commission. In any event, the recommendation of the examiner is neither conclusive on the Commission nor dispositive of the issues in this proceeding.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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December 1969

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JOHN F. DAVIS, CLERK

No. 893

In the Supreme Court of the United States

OCTOBER TERM, 1969

BELL LINES, INC., ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 893

BELL LINES, INC., ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S. App. B) dismissing a complaint brought to set aside certain orders of the Interstate Commerce Commission (J.S. App. C, G and H). Those orders, issued pursuant to Section 210a(a)

of the Interstate Commerce Act, 49 U.S.C. 310a(a),[1] granted temporary authority for Transamerican Freight Lines to conduct motor common carrier operations between its presently authorized eastern and central state territory and certain points in Georgia and the Carolinas.

Pursuant to the Commission's temporary authority rules, 49 C.F.R. 1131.2(c), Transamerican's application was supported by almost 400 shippers who supplied verified statements attesting to an immediate and urgent need for the proposed service and the unavailability of existing service adequate to their needs. The letters from the shippers detailed the inadequacy of service by existing carriers and cited the refusals of various carriers to perform the service they desired (J.S. App. 31, 330). Appellants, a number of competing regular route motor carriers, opposed the application, claiming that they could perform the needed service.

Transamerican's request for temporary authority was initially denied by the Commission's Temporary Authorities Board, by order of July 13, 1967, and Division 1, acting as an Appellate Division, denied a petition for reconsideration on September 27, 1967. Transamerican then filed with the Commission a Petition for Receipt of Additional Evidence and

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[1] The statute provides that

> "to enable the provision of service for which there is an immediate and urgent need . . . the Commission may, in its discretion and without hearing or other proceedings, grant temporary authority for such service or a portion thereof or any part thereof, as to which the Commission finds that"

for Reconsideration," and Division 1 set aside its earlier order, found an immediate and urgent need for the service and granted the application by order of December 5, 1967 (J.S. App. 22). The district court stayed that order on January 5, 1968, and held a hearing on the merits on January 19, 1968.[2]

Nineteen months thereafter, on September 19, 1969, the district court issued its unanimous opinion (J.S. App. A) sustaining the Commission's findings in all respects. The court held: (1) that the application was supported by shippers' statements complying with the Commission's temporary authority rules (J.S. App. 31, 34), and (2) that the Commission could properly reconsider its prior rulings and reverse itself as a result of "* * * inter-agency consideration and reconsideration [which] constitute essential ingredients of the administrative process * * *" (J.S. App. 35).

Subsequent to the filing of the court's opinion, appellants asked the district court for a stay of entry of judgment to enable them to seek reconsideration from the Commission or, in the alternative, to obtain an order from the court directing the Commission to reconsider the matter. The Commission accepted for

[2] At the same time appellants sought judicial review, they also sought reconsideration, oral argument and certification of the proceeding to the entire Commission. These were denied by Division 1 in its order entered December 29, 1967. Petitions seeking a declaration that the issues were of general transportation importance subsequently were also denied. Various requests by the court to delay entry of the Commission's order were acceded to by the Commission solely to enable the court to hear the matter.

filing their extraordinary petitions, which alleged
the record had become stale and that circumstan
had changed. After considering the merits of the
tition, the Commission, by order entered October
1969, reaffirmed its earlier finding of immediate
urgent need for Transatlantic's service. On Oc
22, 1969, after a further hearing on applica
tacks on the Commission's order of October 17
on various motions seeking another court hearing
further stay of judgment, the court gave judgm
for the Commission, but granted appellants 30 days
which to seek a stay from this Court (J.S. App.
[illegible] 21). On November 21, 1969, the Chief Justice den
appellants' requests for a stay.

ARGUMENT

I. Appellants' principal contention here (J.S.
10), as it was below, is that the Commission was
quired as a matter of law to reject Transatlantic's
application because the statements of shippers
porting that application did not literally comply
the Commission's temporary authority regulati
These regulations require that supporting shippers
declare with some degree of specificity the service
cilities they have experienced, the efforts they h
made to obtain service from existing carriers, and
results of such efforts. [illegible] C.F.R. 1132.2(a)(1)(ii)
J.S. 13-14; J.S. App. 64-66). The district court
missed these contentions, holding that some of the
porting letters "[illegible] respond to every requirement
the rules [illegible]" (J.S. App. 31). The court stat

concluded that the Commission's grant of tempo
authority was "supported by the evidence in the
ord" (J.S. App. 38).

There is thus no conflict between the decision in
case and the decisions of the District Court for
Western District of Washington in *Lens Cleaning*
v. United States, 280 F. Supp. 133, and *Black*
Freight Service v. United States, 298 F. Supp.
probable jurisdiction noted, October 27, 1969,
382 and 389, this Term. In those cases the court f
that *no* supporting letter from any shipper
proaches compliance with or provides the inform
required [illegible] by the Commission's regulations
Cochran Co., supra, 280 F. Supp. at 136; see
Black Ball Freight, supra, 298 F. Supp. at
1014. Here, however, the record below establi
nearly 100 letters sent by [illegible] and with
letter service and stated that [illegible]
the [illegible]

petitants next contend (J.S. 9, 12) that the sion improperly reopened this proceeding for eration on the basis of "successive petitions," violations of the Commission's General Rules tice, 47 C.F.R. 1.108, 1.401, and the Administra- cedure Act, 5 U.S.C. (Supp. IV) 557. No such ion can be shown. The Commission's regula- ifically provide for such rehearing or reconsid- ion upon petition (47 C.F.R. 1.108, 1.401(h)), and petitions fully met the requirements of ... subject to any cumulative or successive ... [illegible] ... petitioners' petitions, affidavits, ... [illegible] ... (J.S. App. 23). The Commission ... [illegible] ... and reconsideration ... [illegible] ... of the administrative pro- ... [illegible] ... and to bring uniformity and ... [illegible] ... the various factors which it ... [illegible] ... the exercise of the agency's final ... [illegible] ... App. 23a). The court was ... [illegible] ... of the Administrative ... [illegible] ... did not apply ... [illegible] ... the requisite statutory

Additionally, Section 17(7) of the Act, 49 U.S.C. 17(7), gives the Commission continuing jurisdiction over its orders and clearly empowers it to rehear or reconsider and to rescind, change, or modify such orders at any time for the purposes of correcting an error or injustice. See, *e.g.*, *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 483–484; *Sprague v. Woll*, 122 F. 2d 128, 130 (C.A. 7), certiorari denied, 314 U.S. 669; 2 Davis, *Administrative Law Treatise*, 18.09, pp. 606–610. The Commission's decision, after further deliberation, to grant the application upon a reopened record is fully consistent with sound practice and well-established law. *Resort Bus Lines, Inc. v. Interstate Commerce Commission*, 264 F. Supp. 742, 745 (S.D.N.Y.).

United Co. v. Pennsylvania R.R. Co., 381 F. 2d 4 (C.A. 1), cited by plaintiff, was an extreme case in which the court determined that the Commission had exceeded its power in reopening a reparation case decided nearly three years earlier in order to "apply retroactively its new policy" and stated that such a delayed action "would result in grave and unwarranted uncertainty of action for those who must rely on its finality." *Id.* at 10. However, new policy matters were involved; the parties were still before the Commission; Transamerican had filed appropriate petitions under the Commission's regulations; and no

"uncertainty" existed which could have led to detrimental reliance by any party on the Commission's order. The district court properly found that *Upjohn* was not pertinent (J.S. App. 35).

3. Finally, appellants contend that the district court erred in not (1) ordering the Commission to consider their extraordinary petitions for reconsideration filed subsequent to the court's opinion entered September 19, 1969; or (2) finding that the Commission's order denying the extraordinary petitions was improper (J.S. 18, 19). The answer to the first argument is that the Commission did consider appellants' extraordinary petitions on the merits and denied the relief sought prior to the second district court hearing on October 22, 1969 (J.S. App. 11). Appellants can hardly fault the district court for not ordering the Commission to do what it had already done.

Nor was there any basis for requiring that the Commission reverse its grant of authority. Appellants allege that the passage of some 19 months between argument and disposition of the case in the district court caused the record to become stale; and they also point to recommendation by a Commission examiner that a corresponding permanent application be denied. But whenever judicial review, and a judicial stay, of a temporary authority are sought, a significant delay may result; that is in itself no reason for disapproving the authority on the merits. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514, 515. And here the Commission has specifically found that appellants made no showing that

its order should be changed. The examiner's repo
on Transamerican's separate request for permane
authority, whether favorable or unfavorable to appe
hants, is but one step in an uncompleted administra
tive proceeding, and it may or may not become t
ultimate decision of the Commission. Surely it is
basis for interfering with the Commission's ord
granting temporary authority and its subsequent fin
ing that the need has remained unabated.

CONCLUSION

The judgment of the court below should be affirme
Respectfully submitted.

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